(1)

86-1746
No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

LINDA J. DARNELL (ROSE), et al.,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOR THE FEDERAL CIRCUIT

Richard J. Leighton
Counsel of Record
1667 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 955-3900
Counsel for Petitioners

LEIGHTON & REGNERY
Of Counsel
April, 1987

QUESTION PRESENTED

Whether, under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), as applied to the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101, 1201, et seq., federal agencies may terminate tenured public employees for cause without first granting those employees their requests for "an opportunity to present [their] side of the story"? Loudermill, 470 U.S. at 546.

PARTIES TO THE PROCEDURE

The Federal Aviation Administration of the Department of Transportation, which terminated the petitioners, was the opposing party in all cases and is the respondent here. Petitioners are the following persons who were terminated from federal employment and who had their claims adjudicated in the identified U.S. Court of Appeals for the Federal Circuit and Merit Systems Protection Board decisions:

Petitioner	Linda J. Darnell (Rose)
Federal Circuit Decision	Darnell (Rose), et al.
MSPB Decision	Martinkovic and Rose*

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* Presiding official decision only. Pursuant to 5 U.S.C. §§ 7701(e)(1) and 7703(a), (b), petitioner appealed this decision directly to the court of appeals.

Petitioner	Robert Martinkovic
Federal Circuit Decision	Darnell (Rose), et al.
MSPB Decision	Martinkovic and Rose*
Petitioner	Charles D. Polley
Federal Circuit Decision**	Polley, et al.
MSPB Decision	Gardner, et al.*
Petitioner	Donald T. Shankle
Federal Circuit Decision**	Polley, et al.
MSPB Decision	Gardner, et al.*
Petitioner	Leroy D. Alexander
Federal Circuit Decision**	Alexander
MSPB Decision	Alexander and Jones*
Petitioner	Patrick W. McCormack
Federal Circuit Decision**	McCormack

** The principal authority cited in each case was Darnell (Rose) v. Department of Transportation, 802 F.2d 943 (Fed. Cir. 1986).

MSPB Decision	McCormack
Petitioner	Richard E. Swauger
Federal Circuit Decision**	Swauger
MSPB Decision	Swauger

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS

STATUTES

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Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals in the case of petitioners Darnell (Rose) and Martinkovic (App., infra, 1a) is reported at 807 F.2d 943 (Fed. Cir. 1986). The decision of the Merit Systems Protection Board (MSPB) presiding official as to them is unreported (App., infra, 81a). The opinions of the court of appeals in the case of all other petitioners (App., infra, 51a-70a) are unpublished. The decisions of the MSPB in the case of petitioners Alexander, McCormack and Swauger (App., infra, 87a) are reported at 17 MSPR 346, 15 MSPR 512 and 16 MSPR 566 respectively. The opinion of the presiding MSPB official in the case of petitioners Polley and Shankle (App., infra, 84a) is unreported.

GROUNDS FOR JUDISDICTION

The judgment of the court of appeals (App., infra, 1a) was entered on November 26, 1986. A petition for rehearing was denied on December 31, 1986. On March 4, 1987, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 30, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

STATUTES INVOLVED

1. 5 U.S.C. § 7513 provides in pertinent part as follows:

* * *

(b) An employee against whom an action is proposed is entitled to --

> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b) (2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. U.S.C. § 7513 (1980).

2. 5 U.S.C. § 7701 provides in pertinent part as follows:

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.

* * *

(c)

* * *

(2). . . , the agency's decision may not be sustained . . . if the employee or applicant for employment --

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> * * *
>
> (C) shows that the decision was not in accordance with law.

* * * *

5 U.S.C. § 7701 (1980).

3. 5 U.S.C. § 7703 provides in pertinent part as follows:

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * *

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside

any agency action, findings, or conclusions found to be --

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence . . . .
>
> * * *

5 U.S.C. § 7703 (1980 and Supp. 1986).

STATEMENT OF THE CASE

Petitioners are former Federal Aviation Administration (FAA or agency) employees who received notices of proposed removal that were identical in all relevant respects. In these, the FAA charged them with participating in the 1981 Professional Air Traffic Controllers Organi-

zation nationwide strike and being absent without leave while striking. The agency notice informed petitioners that, if they wished to reply to these charges, they must do so within seven days of receipt of the notice. See Notice of Proposed Removal, App., infra, 33a (Exhibit 1 of Appendix to dissenting opinion at 2).

The notice restated the employees' statutory right to reply orally in person and/or in writing. It listed only the FAA New York regional office as a return mailing address. Petitioners were fired from FAA facilities in the Washington, D.C., area and all resided in that area.

Petitioners responded by notifying the agency, in writing and at the address given, of their wish to reply to the charges and requested additional time to do so. The requests for extension and a

reply opportunity were received at FAA's New York address by the agency within seven days of petitioners' receipt of the notice. See App., infra, 38a (Exhibit 2 of Appendix to dissenting opinion at 3).

While waiting for a decision on their extension and reply opportunity requests, however, each petitioner received a termination letter that stated that he or she had "made no oral or written reply [to the charge]." See App., infra, 44a.

Sometime thereafter, each petitioner received another letter from the FAA deciding official stating that --

> Your letter . . . requesting additional time in which to respond to your notice of intended removal . . . was received in this [the Washington, D.C., area facility] office . . . [after your termination].

* * *

> However, we have carefully considered your request and find no reason to alter our decision [to terminate you].

App., infra, 49a (Exhibit 6 of Appendix to dissenting opinion at 7).

Before receipt of this second letter from the FAA deciding official, petitioners hand-delivered to that deciding official a letter reasserting their due process right by notifying her of their intention to reply to the charges against them. This second letter from petitioners stated that they had discovered (through the receipt of termination decisions by some controllers) that the processing of their request for a pretermination reply opportunity and extension of reply time therefor had been delayed in New York; that the delay in her receipt of their extension and hearing request was the

agency's fault, not theirs; and that their "future correspondence" (e.g., their written replies) would be hand-delivered. App., infra, 47a (Exhibit 5 of Appendix to dissenting opinion at 6). The FAA took no further action on the ground that petitioners already were terminated. Id.

Petitioners appealed their removals to the MSPB, which affirmed, and sought judicial review of this affirmance in the court of appeals.[1/] They challenged their removal principally on the ground that they were not granted their due process right to defend themselves in a pretermination hearing. All court decisions

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1/ Judicial review authority over such matters for federal courts of appeals is found at 5 U.S.C §7703 (b)(1) (Supp. 1986); exclusive jurisdiction in this regard was conveyed to the U.S. Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295 (a)(9) (Supp. 1987).

relating to petitioners rely on Darnell (Rose) v. Department of Transportation, 807 F.2d 943 (Fed. Cir. 1986), App., infra, 1a, for resolution of the question at issue. (Unless otherwise indicated, all citations are to that opinion.)

The court of appeals panel majority determined that the agency fired petitioners before it considered the employees' replies to the agency's charges. 807 F.2d at 945 (App., infra, 4a). The panel majority also found that the FAA, upon post-termination review of the employees' requests for extensions to make replies, determined that these communications "contained nothing to alter the removal decision." Id.

The Darnell majority recognized the central importance of this Court's decision in Cleveland Board of Education v.

Loudermill, 470 U.S. 532 (1985). The majority interpreted Loudermill as implicitly requiring --

> that an opportunity be given an employee to present his side of the story; not a guarantee that the employee must present his story to the agency prior to removal. An opportunity to present is quite different from a presentation in fact.

807 F.2d at 945 (emphasis in original) (App., infra, 7a).

The majority found that petitioners had an opportunity to reply to the charges against them, as evidenced by their requests to reply and pleas for sufficient time to do so, and that, by requesting to reply, they actually exercised their reply opportunity and demonstrated that they disagreed with the charges. 807 F.2d at 945 (App., infra, 4a). The panel further

held that petitioners' subsequent MSPB hearings were de novo hearings in which "[n]one of the defenses [presented] were [sic] legally sufficient, and none was a defense which might invoke the discretion of the agency's deciding official not to remove them." 807 F.2d at 946 (emphasis in original) App., infra, 11a.

Judge Cowen quoted Loudermill in his dissent and found on the facts that each petitioner was --

> denied "an opportunity to present his side of the story" or to invoke the discretion of the [FAA] Facility Chief (the decision maker) before being terminated.

807 F.2d at 948 (dissent) App., infra, 22a, 23a.

Judge Cowen pointed out that the petitioners' "responses" to the FAA notices were received by the agency in a

timely fashion at the only return address given; that this address was not the location of the FAA deciding official, and that the letters were not forwarded from within the agency, itself, to the deciding offical until after she had fired petitioners. Id. Further, Judge Cowen found that these letters clearly were timely requests for extensions of time to answer the charges at a requested subsequent pretermination hearing, not substantive replies to the charges as found by the majority. Id. Judge Cowen concluded as follows:

> I would hold that . . . when the final decision was made, the chief did not have petitioners' answers to the charges, which they would have submitted if the chief had rescinded the removal actions and granted them an oral hearing. Consequently, except for peti-

> tioners' assertions that they had not committed a criminal offense, there was nothing for the Facility Chief to consider -- nothing to "invoke the discretion of the decision maker" -- except the requests for extensions of time. By that time, petitioners had already been fired (App. Exhibit 4) because of the chief's erroneous belief that they had not responded [to the charges] within the 7-day period. Thus, all the circumstances indicated that the final decision was based mainly, if not entirely, on that erroneous assumption.

Id. at 948, 949, App., infra, 24a, 25a.

Judge Cowen also determined that the harmless error rule may not be applied to the due process violations that occurred herein. 807 F.2d at 949, App., infra, 26a.

REASONS FOR ALLOWING WRIT

The court of appeals' decision on this important federal question conflicts with applicable decisions of this Court and with others of the Federal Circuit. The significance of the court of appeals' inconsistency on this question is increased now that the Federal Circuit has exclusive jurisdiction to review such matters. 28 U.S.C. § 1295(a)(9).

The constitutional right of tenured public employees to have a pretermination opportunity to reply to charges against them was confirmed in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), a case involving non-federal public employees. This principle is codified and amplified for all petitioners and most federal employees by the Civil Service Reform Act. 5 U.S.C. § 7513(b) (1980).

Federal agency compliance with this due process requirement has been addressed inconsistently by panels of the Federal Circuit. See Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986) and Smith v. United States Postal Service, 789 F.2d 1540 (Fed. Cir. 1986). Not only do these Federal Circuit decisions cause confusion as to the application of Loudermill to federal employees, they conflict with that circuit's own decision in Mercer v. Department of Health and Human Services, 772 F.2d 856 (Fed. Cir. 1985). Granting the requested writ in the instant case will provide an opportunity to articulate the constitutional rights and obligations of federal employees and agencies in this important but uncertain area.

Under statutory law, before being fired, a federal employee must receive a

written explanation of the charges in a notice of proposed removal, and an opportunity to respond orally and/or in writing to the charges in such a notice. 5 U.S.C. § 7513(b).

A pretermination hearing at the employing agency offers the employee his or her only opportunity while still employed to discuss the matter in an informal atmosphere and usually with a lower level agency deciding official known personally to the charged employee. It is an opportunity to present proof informally and to ask questions about the charges. If the charges are true, it also is an opportunity to attempt privately to invoke the broad discretion of the decision maker by citing mitigating factors (length of service, prior record, etc.) or merely pleading for leniency and a second chance.

There is a vast difference between this informal opportunity to reply privately to a single person and the formal opportunity to defend publicly against an agency's charges, as this Court emphasized in Loudermill, 470 U.S. at 543.

Once fired, the federal employee seeking reinstatement through an appeal to the MSPB must confront his or her own federal agency ready to do battle in a formal adversarial adjudication. In these proceedings, the agency deciding official generally is a witness against the fired employee and part of the entire agency's proof that must be attacked publicly by the employee on the ground that the agency acted improperly. See 5 U.S.C. § 7701 (1980).

The Federal Circuit majority's failure in Darnell to join this Court in

recognizing the immense difference between pretermination and post-termination advocacy needs and opportunities does significant harm to the balances created by the Civil Service Reform Act. By minimizing the great importance of the constitutionally-guaranteed informal pretermination proceeding, and misinterpreting or ignoring this Court's teaching in that regard, the decision in this case encourages agencies to do what was done here -- to refuse to correct substantial due process errors and to ignore and deprecate an employee's timely attempt to reassert due process rights that have been erroneously withheld.

The Federal Circuit discussed the significance of the Loudermill decision to the federal civil service system in Mercer, finding that, "[w]here the agency

has adopted a procedure that provides for a predecision hearing, the denial of a predecision hearing is clear error." Mercer v. Department of Health and Human Services, 772 F.2d 856, 859 (Fed. Cir. 1985) (emphasis added). No constitutional error was found in Mercer, because Mercer's union representative actually made an oral response to the charges in the notice of proposed removal on behalf of Mercer. However, Mercer's termination was reversed because he was denied an additional reply procedure established by Health and Human Services regulations. In articulating a principle that should have had even greater impact in the instant case because of the more important constitutional dimensions here, the Mercer panel unanimously stated:

> Although the government argues that Mercer's exercise of

> his right to an oral reply before the presiding official rendered harmless the denial of the additional predecision rights, we cannot agree. A person has a better and perhaps dispositive chance of successfully contesting termination of benefits before, not after, the benefits are terminated. See Goldberg v. Kelly, 397 U.S. 254, 264, 90 S. Ct. 1011, 1018, 25 L. Ed. 2d 287 (1970).

772 F.2d at 860.

The Federal Circuit also addressed this pretermination reply issue for federal employees in Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986). In Alberico, an army reserve officer was terminated by the Army for criminal conduct. The majority opinion equated Alberico's formal criminal Article III trial -- which took place prior to his removal -- to an agency hearing. Judge Bissell, concurring, rejected the concept of reliance on a prior criminal trial to

satisfy civil due process needs, as well as implications in the opinion that a post-termination hearing would be constitutionally sufficient. 783 F.2d at 1030 (concurrence). She concurred on the basis of her finding that Alberico actually exercised his opportunity to reply to the charges through his counsel, and therefore concurred in the affirmance of his removal. 783 F.2d at 1030-31.

In Smith v. United States Postal Service, 789 F.2d 1540 (Fed. Cir. 1986), a unanimous panel of the Federal Circuit recognized the importance of the pretermination right to respond informally to charges. It stated that, if that right were denied "by agency action, negligence, or design, and in the face of even a reasonable effort by Smith to assert that

right, reversal would promptly follow." 789 F.2d at 1543 (emphasis added).

In Smith, Smith's union representative actually participated in a pretermination hearing without Smith's knowledge. The court cited the participation of the union representative, plus Smith's failure to attempt a timely reply, as evidence of his having exercised his constitutionally-guaranteed opportunity to respond.

Herein, the Federal Circuit majority retreats far from the principles that it set forth in Smith. Under Darnell, there was no pretermination appearance before the agency deciding official, or delay in asserting such a right, yet the Federal Circuit majority held that there was a waiver of further due process reply rights. Darnell stands for the proposition

that, if the employee merely hints at any issue regarding the substance of his or her proposed removal -- even if only in a request for reasonable opportunity to reply -- the constitutional right is waived. Further, a timely objection to an improperly issued letter of termination -- which was emphasized as critically lacking in Smith -- does not aid in restoring an employee's misappropriated due process right to reply under Darnell. Under this decision, the agency may "[play] 'fast and loose' with the procedure designed to insure protection of employees' rights" without fear of sanction. Smith, 789 F.2d at 1543.

Inexplicably, although quoted with approval in Mercer, 772 F.2d at 859, the majority holding in Darnell completely

ignores the following plain teaching of this Court in Loudermill --

> Even where the facts [providing grounds for removal] are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

470 U.S. at 543.

Moreover, the Federal Circuit's decision in Darnell confuses the roles of the deciding agency official, which is to exercise discretion informally and unilaterally, and the reviewing authority of the MSPB presiding official, to find facts and make adjudications in an adversarial proceeding.

This confusion may be illustrated by the same majority's reliance upon Darnell to affirm the termination of Richard E. Swauger, one of the petitioners herein.

See Swauger v. Department of Transportation, Appeal No. 85-1752 (Fed. Cir. Dec. 9, 1986), App., infra, 67a. Mr. Swauger failed to receive a pretermination hearing based on facts identical to those in Darnell. He formally presented during his MSPB adjudication factual defenses that he had been denied the opportunity to present informally at the agency level prior to his removal.[2/] The majority failed to acknowledge that petitioner raised what the panel members, themselves, characterized in Darnell as "a defense which might invoke the discretion of the agency's deciding official not to remove [him]." 807 F.2d at 946 (emphasis in the

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2/ One of the defenses Mr. Swauger alleged was emotional incapacitation to work, due to the recent near collision of two aircraft on his watch for which he had sole responsibility.

original), App., infra, 11a. Failure to raise such a defense before the MSPB was relied on in finding that petitioners in Darnell were "not denied 'the only meaningful opportunity to invoke the discretion of the decision maker'." Id., App., infra, 11a.

A. OVERLOOKED OR MISAPPREHENDED PRINCIPLES OF LAW

1. The Federal Circuit Incorrectly Interprets Loudermill

The panel majority correctly noted that the Loudermill decision requires that "[t]he tenured public employee is entitled to . . . an opportunity to present his side of the story." 807 F.2d at 945, App., infra, 5a. The majority then interprets this requirement as "not a guarantee that the employee must present his story to the agency prior to removal. An oppor-

tunity to present is quite different from a presentation in fact." Id., App., infra, 7a (emphasis in the original). This interpretation, as applied in Darnell, is contrary to the following principles announced in Loudermill:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.

470 U.S. at 542 (citations omitted) (emphasis added). This Court amplified this concept by holding that ---

> [t]he essential requirements of due process, . . . are notice and an opportunity to respond.

> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

470 U.S. at 546 (citations omitted).

In the context of Loudermill, the opportunity "to present his side of the story" clearly must mean an opportunity exercisable before the decision to terminate the employee is made. To be sure, an employee may waive his or her right. But, contrary to the implication of the Darnell majority, this clearly cannot happen under circumstances such as those here. In its proper factual context, the Darnell majority's interpretation amounts to a perverse holding that the mere assertion of a guaranteed right in a timely request to exer-

cise that right can be deemed a waiver of the right. We respectfully submit that the Darnell majority thus stands the due process clause on its head. We submit that this Court properly held that the Constitution guarantees a federal employee the right to have his or her response to the charges in a proposed removal not only considered, but considered prior to the decision on his or her termination.

2. The Federal Circuit Incorrectly Established a Harmless Error Exception to Constitutional Due Process Requirements.

The Darnell majority asserts that any agency errors in the constitutionally-mandated pretermination procedures were harmless, thus creating a "harmless error" exception to constitutionally-mandated procedural due process in removal cases. 807 F.2d at 946, App., infra, 8a.

It is the interest in avoiding any underlying error upon which the due process requirement is based. This Court -- by weighing the possibility of errors in determining whether a due process violation occurred -- has determined tha' a violation of such a right can never be "harmless."[3/]

The criminal law decisions of this Court cited by the Federal Circuit majority fail to bolster their assertion. They stand solely for the proposition that, when a trial has been held, the Constitution does not require it to be

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3/ See, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

error-free within certain limits.[4/] More important, this Court recently addressed the issue of due process in the criminal context and failed to raise the issue at all. Ake v. Oklahoma, 470 U.S. 68 (1985). While error in the conduct of a trial may at times be harmless, the denial of a

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4/ Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986), dealt with the confrontation clause, while United States v. Hasting, 461 U.S. 499 (1983), dealt with comments by the prosecutor that allegedly violated the defendant's right not to testify. The panel majority ignored the Court's observation in Hasting that —

> [In Chapman v. California, 386 U.S. 18 (1967)] [t]he Court acknowledged that certain errors may involve "rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23, citing Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge).

461 U.S. at 508 n.6.

constitutionally-mandated trial, itself, is never harmless. In the instant case, the error is the denial of a constitutionally-mandated hearing, itself, and not merely a flaw in such hearing. Harmless error has never been applied to such a situation, and never should, under a correct reading of Loudermill.

The Federal Circuit's findings of harmless error conflicts with its own decision in Mercer. Mercer held that denial of a pretermination hearing that was guaranteed merely by regulation could not be harmless. This circuit, in Mercer, put a higher value on a regulatory right than it did, in Darnell, on a recognized constitutional right. Such a jarring inequality should not be allowed to remain.

B. MISAPPLICATION OF LAW TO FACTS

1. The Federal Circuit Majority Incorrectly Found That Petitioners Had Replied.

Contrary to the assertion of the Federal Circuit majority, petitioners did not reply to the substantive charges made in their notices of proposed removal. The "reply" cited by the majority plainly is nothing more than a timely request for a pretermination reply opportunity and for a reasonable extension of the minimum seven-day reply time to prepare for it. This request by petitioners to the agency is set forth in App., infra, at 38a (Exhibit 2, Appendix to dissenting opinion at 3). It cannot support the Federal Circuit majority's clearly erroneous finding that the petitioners responded in writing to the charges in their notice of proposed removal. 807 F.2d at 944, App., infra, 8a.

Petitioners' letters notify their facility chief of their intent to answer the charges in person, request an opportunity to review the evidence on which the charges were based and state, inter alia, that "there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed." The Federal Circuit majority expressly recognizes this. 807 F.2d at 944. Inexplicably, however, the majority ignores the identical opening paragraph of each letter that states that its purpose is "to request an extension of time in which to file a written answer to the notice of proposed [termination] action." This request was necessitated by the agency's express invocation of the rarely-used crime exception to the 30-day notice requirement. The FAA termination notices

to which petitioners were responding stated that the agency had --

> reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter.

App., infra, at 33a (Exhibit 1, Appendix to dissenting opinion at 2). Cf. 5 U.S.C. § 7513(b)(1) and (2). It was in light of this assertion that petitioners informed the agency in their request for a reply opportunity and extension therefor as follows:

> First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. § 7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

App., infra, 38a (Exhibit 2, Appendix to dissenting opinion at 3). When quoted in full context, rather than partially as the Federal Circuit majority did, petitioners' claim that they had not committed a crime is seen for what it was -- a basis for objecting to the foreshortened response time. It was not, as the panel majority asserts, a substantive denial of the charges that constituted a full exercise of their constitutional and statutory reply rights. 807 F.2d at 944, 945, App., infra, 8a. Had the panel majority properly understood the clear meaning of petitioners' letters, it would have been forced to find a violation of petitioners' constitutional right to pretermination hearings and reversed petitioners' removals.

2. The Federal Circuit Majority Incorrectly Found that FAA Had Considered Petitioners' Reply.

The agency never charged petitioners with a crime. Petitioners had no such charge to which they could reply, even if they wanted. However, the Federal Circuit majority compounds its misreading of the agency notice and petitioners' initial request by also misinterpreting the second letter sent from the FAA to petitioners, as follows:

> [T]he Agency reviewed the [petitioners'] replies and determined and advised petitioners that they contained nothing to alter the removal decisions.
>
> * * *
>
> Hence, the petitioners were afforded an opportunity to present their side of the story at the agency level . . . .

807 F.2d at 945, App., infra, 8a.

The FAA letter to which the panel majority refers states that "[w]e have

carefully considered your request and find no reason to alter our [termination] decision." App., infra, at 49a (Exhibit 6, Appendix to dissenting opinion at 7) (emphasis added). That decision was made by the FAA without a pretermination hearing and on its express finding that no reply to the charges was made or requested. See App., infra, 33a, 36a (Exhibits 1 and 2, Appendix to dissenting opinion). The only "request" that petitioners had made was a request for an opportunity to reply after the seven-day period. This fact could not be noted more clearly in the first paragraph of the subject FAA letter, which was not cited by the Federal Circuit majority: "Your letter dated August 11, 1981 requesting additional time in which to respond to your notice of intended removal . . . was received in

this office . . . ." See App., infra, 49a (Exhibit 6, Appendix to dissenting opinion at 7) (emphasis added). A plain reading of this agency's letter will show equally clearly that the FAA, itself, did not consider petitioners' reference to the statutory crime exception to be petitioners' written defense against the enumerated charges. Had it so considered that statement, the agency would have followed required procedures and notified petitioners, in their removal letters, that it had considered their specific reply and had rejected it. 5 U.S.C. § 7513 (b)(4), (e).

Even if one were to accept the Federal Circuit majority's incorrect assertion that petitioners did respond to the notice of proposed removal by giving "their side of the story," it is clear that the agency

did not consider that response as it was constitutionally required to do. See App., infra, 33a, 38a (Exhibits 1 and 2, Appendix to dissenting opinion). A constitutionally-mandated opportunity to respond is meaningless in the absence of a corresponding duty upon the decision maker to consider that response. The petitioners' responses expressly not having been considered as replies to the charges in this case, the removals must be reversed.

CONCLUSION

Termination of career federal public servants such as petitioners is the harshest penalty under the Civil Service Reform Act. Where the servants' career requires considerable specialization and is one that exists virtually only within the federal public sector, as in the present

case, termination amounts to career capital punishment. To take a person's economic life without being willing to listen to his side of the story is fundamentally wrong under American law and public policy. This Court must make that clear before it happens again.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard J. Leighton
LEIGHTON AND REGNERY
1667 K Street, N.W.
Suite 801
Washington, D.C. 20006
(202) 955-3900

Counsel for Petitioners

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